83-1211

No. -

In the Supreme Court of the United States

October Term, 1983

TEAMSTERS LOCAL UNION NO. 36,
BUILDING MATERIAL AND DUMP
TRUCK DRIVERS,
Petitioner,

vs.

LEE O. EDWARDS, JR.,
Respondent.

Petition For Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Questions Presented for Review.

(1) WHETHER THE NINTH CIRCUIT ERRED IN REFUSING TO APPLY MITCHEL TO PETITIONER UNION.

(2) WHETHER THE NINTH CIRCUIT ERRED IN REFUSING TO APPLY THE 10(b) PERIOD AS THE LIMITATIONS PERIOD TO CASES PENDING PRIOR TO THIS COURT'S DECISION IN DELCOSTELLO.

Parties To The Proceeding.

The following are parties to this proceeding:

(1) Lee O. Edwards, Jr.

(2) Teamsters Local Union No. 36, Building Material & Dump Truck Drivers

(3) Asphalt, Inc.

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No. __-_____

In the

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Teamsters Local Union No. 36,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Building Material and Dump Truck Drivers, Teamsters Local Union No. 36 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, hereafter "Union", prays that certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in the above-entitled case.

OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals is, to date, not officially reported. The opinion is unofficially reported at 114 LRRM 3227.[1]

The memorandum decision of the United States District Southern District of Calif-

[1] The opinion of the Ninth Circuit is set forth in full in Appendix 1.

ornia is neither officially nor unofficially reported.[2]

JURISDICTION

On November 3, 1983, the Ninth Circuit Court of Appeals entered its judgment.

The jurisdiction of this Court is invoked pursuant to 28 USC §1254(1) (1976).

STATUTORY PROVISIONS INVOLVED

29 USC §185(1976) of the Labor Management Relations Act, hereafter "Act", states in pertinent part[3]:

> "(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

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[2]The opinion of the District Court is set forth in full in Appendix ii.

[3]The statute is set out in full in Appendix iii.

STATEMENT OF THE CASE

A. Preliminary Statement.

This case came to the Ninth Circuit on Plaintiffs/Appellants' appeal of the memorandum decision of the U.S. District Court for the Southern District of California.

The basis for jurisdiction in the Ninth Circuit was 28 USC §1291(1982).

B. Statement of the Facts.

Edwards is a member of a bargaining unit which is covered by a collective bargaining agreement between Local 36 and Asphalt, Inc. Said collective bargaining agreement provides for, among other things, a grievance/arbitration procedure.

On or about December 24, 1980, Asphalt terminated Edwards who thereafter filed a grievance with the Union.

On February 9, 1981, pursuant to said collective bargaining agreement, a Joint Conference Board considered Edwards' grievance and in a final decision rejected it

as untimely.

Edwards, cognizant of additional grounds for challenging his termination, filed another grievance in March 1981 with the Union. This second grievance was also rejected by the Joint Conference Board in a final arbitration award in March 1981. The rejection was based on the same reasons as the adverse determination of February 9.

Edwards was in attendance at each of the Joint Board hearings and was made immediately aware of the adverse awards.

On December 15, 1981, Edwards filed a complaint in the United States District Court for the Southern District of California. Edwards' complaint was a "hybrid" Section 301 suit. That is, Edwards alleged that the employer breached the collective bargaining agreement while the Union breached its duty of fair representation. The Court's jurisdiction was based on 29 USC §185(1976).

Additionally, the complaint contained pendant claims based on state law against both Asphalt and the Union.

C. Proceedings and Disposition Below.

The Union subsequently moved to dismiss Edwards' complaint. The Union, relying on United Parcel Service, Inc. v. Mitchell, 451 US 56(1981), contended that the applicable statute of limitations was California's 100 day limitation period for suits to vacate an arbitration award, California Civil Procedure Code Section 1288(West's 1982)[4], and that, therefore, Edwards' complaint was barred as untimely.

The U.S. District Court agreed with the Union's contentions and therefore dismissed Edwards' complaint in its entirety.[5] Sub-

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[4]California Civil Procedure Code §1288 is set forth in full in Appendix iv.

[5]By stipulation, the complaint against the Employer, Asphalt Inc., was dismissed with prejudice. The stipulation is set forth in full in Appendix v.

sequently, Edwards timely appealed to the Ninth Circuit.

Edwards appealed the judgment as to only the Union.

The Ninth Circuit held that the Mitchell decision was applicable to only an employer. Relying on a previous Ninth Circuit decision, Price v. Southern Pacific Transportation Company, 586 F2d 750(9th Cir.1978), the Court held that as to the union the applicable statute of limitations in reference to an alleged breach of the duty of fair representation was California Civil Procedure Code §338(1)(West's 1982)[6], a three year statute.

After reviewing the factors set forth in Chevron Oil Company v. Huson, 404 US 97 (1971), the Ninth Circuit further held that the decision in DelCostello v. Teamsters, __US__103 S.Ct. 2281(1983) would not be retroactively applied to the present case.[7]

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[6]California Civil Procedure Code §338(1) is set forth in pertinent part in Appendix vi.

[7]In footnote 2 of its Decision, the 9th Circuit states that "the Union does not argue here that §10(b) should be applied to

The District Court's dismissal of Edwards' suit against the Union was therefore reversed and remanded.

The Union now seeks review of the Ninth Circuit's decision and judgment in its entirety.

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bar Edwards' action ... " 114 LRRM 3227, 3229. While it is true that oral and written argument was completed prior to this Court's decision in DelCostello, the Union, by letter dated June 27, 1983 requested that the Ninth Circuit consider the then recently announced DelCostello decision in reference to the case before it. [FRAP Rule 28(j)] Said letter is set forth in full in Appendix vii.

ARGUMENT

This writ should be allowed for the following reasons:

I

THE NINTH CIRCUIT'S REFUSAL TO APPLY MITCHELL TO THE UNION IS CONTRARY TO DECISIONS BY THIS COURT

In cases where Mitchell is deemed applicable to employers, the Ninth Circuit has adopted a staggered statute of limitations scheme in reference to a hybrid Section 301/ fair representation claim. In such a hybrid suit, the Ninth Circuit would have California Civil Procedure Code §1228, a one hundred day limitation period, applied to the employer while California Civil Procedure Code §338(1), a three year limitation period would apply to the union. According to the Ninth Circuit, "the choice of a three year statute does not violate federal labor policy, for two reasons. First, ... the possibility of

employee suits against a union does not threaten the quick resolution of labor disputes by means of grievance proceedings. Second, a three year period is in no sense inherently too long." Edwards v. Teamsters Local 36, __F2d__ (9th Cir.1983); 111 LRRM 3227, 3229. The Ninth Circuit's contentions are directly at odds with this Court's decision in DelCostello, supra.

First, this Court's decision in DelCostello v. Teamsters, __US__ 103 S.Ct. 2281 (1983) makes it clear that as a matter of national labor policy the same statute of limitations should be applied to both claims against an employer and a union. Prior to DelCostello, the question as to what statute should govern the fair representation claim against the Union was not definitively answered. Id, 2285. After DelCostello, that question was closed. A six month period under §10(b) of the Act was to be applied to claims against both employers and unions.

According to DelCostello, the two claims involved in a hybrid §301/fair representation suit are "inextricably interdependent". Id at 2290, quoting from Mitchell, 451 US at 66. Given the interdependency of the claims, the application of the same limitation period to both employer and union furthers the policy of a rapid resolution of labor disputes for such a claim constitutes "a direct challenge to the private settlement of disputes under [the collective bargaining agreement]". Id at 2291, quoting Mitchell, 451 US at 66.

Under the Ninth Circuit ruling in Edwards, an employee whose claim arose before 1983 must now bring his 301 action against the employer within 100 days after the claim arose. As to the fair representation claim against the Union, however, the employee is given three years from the time at which the claim arose to file suit. The Ninth Circuit's contention that such a staggered scheme "does not threaten a quick resolution of labor

disputes by means of proceedings" is clearly contrary to the Court's reasoning in Del-Costello.

Second, the Ninth Circuit's belief that a three year statute of limitations period as to the Union is "in no sense inherently too long" is also clearly at odds with Del-Costello.

In DelCostello, the Court reviewed various statute of limitations alternatives but eventually rejected all in favor of the six month period pursuant to 10(b) of the Act. Thus, the Court discussed the suggestion that the State limitations period for legal malpractice be applied in hybrid §301/fair representation claims. The Court rejected this suggestion for, among other things, legal malpractice statutes involve time periods which the Court believed were far too long.

The Court specifically noted that had such a legal malpractice limitations period

been used, the respondents Flowers and Jones would have had three years in which to file suit. The Court rejected such a three year statute of limitations as too lengthly for with such a time period the grievance/arbitration system could easily become unworkable. Id at 2292-2293.

The Ninth Circuit's decision to adopt a three year statute of limitations period as to the Union is blatantly contrary to the belief of this Court that such a time period is inimical to the grievance/arbitration process.

II

THERE NOW EXISTS AN EXPRESS CONFLICT AMONG THE CIRCUITS AS WHETHER MITCHELL SHOULD BE APPLIED TO UNIONS.

The Ninth Circuit in both the above-captioned case and McNaughton v. Dillingham Corp., 707 F2d 1042(9th Cir. 1983) has held that Mitchell is not applicable to unions.

The Sixth Circuit, in Lawson v. Truck Drivers, Chauffeurs and Helpers, etc., 698 F2d 250 (6th Cir. 1983), cert denied, sub nom. Leach v. U.S. Postal Service, __ US __ (Oct. 3, 1983), 104 S.Ct. 69 [8], held that that Circuit's policy was to interpret Mitchell as requiring that the same statute of limitations concerning a vacation of an arbitration award be applied to both the employer and the union in a hybrid Section 301/fair representation claim. See also: Badon v. General Motors Corp., 679 F2d 93 (6th Cir, 1982); D'Andrea v. American Postal Workers, 700 F2d 335 (6th Cir, 1983).

In conclusion, because of this "unusually direct conflict between two circuits," the Union respectfully requests that certiorari issue. Corning Glass Works v. Brennan, 417

[8] In his Petition for Certiorari, the issues presented by Petitioner Leach were, among other things, whether the 6th Circuit erred in applying Mitchell to the union. LRX Supreme Court Docket-104, Oct. 24, 1983.

US 188, 191 (1974).[9]

III

THE NINTH CIRCUIT'S REFUSAL TO RETROACTIVELY APPLY DELCOSTELLO IS CONTRARY TO DECISIONS BY THIS COURT

While Edwards received his final adverse arbitration award in March 1981, he did not file suit until December 1981. The Ninth Circuit, however, has refused to apply DelCostello retroactively to Edwards.

In DelCostello petitioner, DelCostello, received his adverse award in August 1977 but did not file suit until March 1978. Respondents Flowers and Jones received their adverse award in February 1978 but did not file suit until January 1979. DelCostello, supra,

[9]The 9th Circuit's Edwards decision conflicts not only with decisions of the 6th Circuit but is also contrary to prior 9th Circuit caselaw. In Singer v. Flying Tiger Line, Inc., 652 F2d 1349(1981), the 9th Circuit held that it would prospectively apply Mitchell to both the employer and the union. Id. at 1353.

2285, 2286.

This Honorable Court had no problem in applying its newly announced six months limitation period to respondents Flowers and Jones and thereby finding that their suit, filed more than ten months after their cause of action accrued, was untimely. As to petitioner DelCostello, his case was reversed and remanded for further proceedings consistent with the Court's opinion due to the fact that the District Court failed to consider DelCostello's tolling claim.

In International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers Local 988 v. Edwards, __US__ (1983), 103 S.Ct. 3104, this Court granted certiorari, vacated the Fifth Circuit's judgment, and ordered that Circuit to apply DelCostello to an employee who received an adverse arbitration award in April of 1980 but failed to file suit until April of 1981.

In Edwards, the District Court dismissed Plaintiff's §301 suit as time barred as to both the employer and the union under the 90 day limitations period of the Texas General Arbitration Act.

The Fifth Circuit reversed the District Court and held that the appropriate statute of limitations as to the employer was Texas' four year "catch all" statute while the claim against the union was governed by Texas' 2 year statute of limitation applicable to tort actions. Edwards v. Sea-Land Service, Inc., 678 F2d 1276(5th Cir. 1982).

In District 1199, National Union of Hospital and Healthcare Employees v. Assad, __US__(1983), 104 S.Ct. 54, this Court granted certiorari, vacated the judgment of the Second Circuit and further ordered that Circuit to apply DelCostello where the employees' hybrid claim arose in October 1980 but a complaint was not filed until June 1981.

The District Court had held that plaintiff's entire suit was untimely under New York's 90 day arbitration statute.

The Second Circuit had held that, as plaintiff's grievance had never been arbitrated, the 6 month limitations under §10(b) of the Act governed plaintiff's claim against the employer. The Second Circuit simultaneously held that the plaintiff's fair representation claim against the union was governed by New York's three year malpractice statute. In sum, the District Court's holding that plaintiff's entire suit was untimely was reversed and remanded as to the union by the Circuit. Assad v. Mount Sinai Hospital, 703 F2d 36(2nd Cir. 1983).

In sum, the Ninth Circuit's refusal to apply DelCostello in the above-captioned case is clearly out of step with this Court's continuing willingness to apply DelCostello in similar situations.

IV

THERE NOW EXISTS AN EXPRESS CONFLICT AMONG THE CIRCUITS AS TO WHETHER DELCOSTELLO SHOULD BE APPLIED RETROACTIVELY

After reviewing the factors set forth in Chevron Oil, supra, the Ninth Circuit refused to apply DelCostello retroactively. The 9th Circuit's action is clearly contrary to the position of other Circuits.

The Third Circuit, after explicitly reviewing the factors in Chevron Oil, supra, held that DelCostello should be applied retroactively to an employee whose claim arose in or about October 1979 but who did not file suit until September 1981. Perez v. Dana Corp., 718 F2d 581(3rd Cir. 1983).

The Fifth Circuit, upon remand from this Court, held as untimely a hybrid §301 claim filed one year after an adverse arbitration award. The 5th Circuit applied DelCostello retroactively after a specific analysis of

the factors set forth in Chevron Oil, supra. Edwards v. Sea-Land Service, Inc., __F2d__ (5th Cir. Dec. 5, 1983); 114 LRRM 3663.

Other Circuit decisions have implicitly applied DelCostello retroactively.

The Sixth Circuit applied DelCostello where the final adverse arbitration award was issued August 1979 while the complaint was filed April 1981. Curtis v. Teamsters Local 299, 716 F2d 360 (6th Cir.1983).

The Seventh Circuit, in Metz v. Tootsie Roll Industries, 715 F2d 299 (7th Cir.1983) applied DelCostello where the claim arose in May 1981 but the suit was not filed until June 1982.

Similarly, the 7th Circuit applied DelCostello and held untimely an action filed in April 1982, eleven months after the issuance of the adverse arbitration award in May 1981. Ernest v. Indiana Bell Telephone Company, 717 F2d 1036 (7th Cir.1983). See also: Storck v. Teamsters Local 600,

712 F2d 1194(7th Cir. 1983).

The Eleventh Circuit applied DelCostello retroactively finding that an employee's suit which had been filed four months after the claim arose and which had previously been dismissed by the District Court as untimely to both the employer and the union under Florida's 90 day statute of limitations for the vacation of an arbitration award was, in fact, timely under DelCostello's six month time period. Hand v. International Chemical Workers Union, 712 F2d 1350(11th Cir. 1983), 114 LRRM 2254.

In Rogers v. Lockheed-Georgia Co., __ F2d__(11th Cir. Dec. 5, 1983), 114 LRRM 3660, the 11th Circuit, after noting that "the Supreme Court in DelCostello applied its decision retroactively to the parties before the Court" so as to promote the rapid resolution of labor disputes, concluded that to "deny retroactive application of DelCostello

would retard rather than further the federal interests in prompt resolution of labor disputes, finality, and consistency embodied in DelCostello". Id at 3662.

In conclusion, the Ninth Circuit's refusal to retroactively apply DelCostello in the above-captioned matter is clearly contrary to the position taken by other Circuits.

V

CONCLUSION

The Ninth Circuit's decision in the above-captioned matter has had a serious impact on similar cases within the Circuit.[10]

The Ninth Circuit's decision in this case is contrary to the decisions of other circuits and to decisions of this Honorable Court. For the foregoing reasons, the Union respectfully requests that certiorari issue to review the decision below.

Respectfully submitted,

RICHARD D. PROCHAZKA

Attorney for Building Material and Dump Truck Drivers, Teamsters Local Union No. 36 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America.

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[10] Appendix viii is a listing of cases within the Ninth Circuit affected by the Edwards decision.

APPENDICES

APPENDIX i

Opinion

United States Court of Appeals

For the Ninth Circuit

Lee O. Edwards, Jr.,

Plaintiff-Appellant,

vs.

Teamsters Local Union No. 36,

Building Material and Dump

Truck Drivers,

Defendants-Appellees.

No. 82-5326

USDC No. CV 81-1278-WBE

Appeal from the United States

District Court for the Southern

District of California

Hon. William B. Enright, District

Judge, Presiding

Argued and Submitted: November 5, 1982

Before: FLETCHER, NELSON, Circuit Judges, and EAST,* District Judge.

NELSON, Circuit Judge:

Edwards appeals from the dismissal of his suit against his union for breach of its duty of fair representation in grievance proceedings following his dismissal from employment. Edwards filed this action nearly a year after he was discharged, and more than ten months after his grievance against his employer was unfavorably resolved. The court below dismissed Edwards' claims against the employer and the union as untimely filed on the authority of United Parcel Service v. Mitchell, 451 U.S. 56, 101 S. Ct.

*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

1559, 67 L. Ed. 2d 732 (1981). Edwards appeals only the judgment for the union. We reverse that judgment and remand the case for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

This suit arises from the discharge of appellant Edwards by appellee Asphalt, Inc. (Asphalt). After seven years of continuous employment, Edwards was absent from work for health reasons for more than six months in 1980. When he attempted to return to work on December 24, he was dismissed. Edwards was a member of Teamsters Local Union No. 36, Building Material and Dump Truck Drivers (Union), which had a collective bargaining agreement (Agreement) in force with Asphalt.

After his termination, Edwards filed a grievance with the Union alleging he was fired in violation of the Agreement.

Because of the Union's conduct, Edwards has been unable to obtain a hearing on the merits of his grievance. The Union twice took this grievance before the Joint Conference Board, a three member arbitral body set up under the Agreement. The claim was dismissed at the first hearing because the Union had failed to refer the matter to the Joint Conference Board within fifteen days as required by the Agreement. By advancing additional grounds for the illegality of his termination, Edwards convinced the Union to refer his grievance to the Board a second time. This claim was denied on the grounds that the Union had not originally communicated his grievance to the employer within ten days after it arose, again as required by the Agreement. It appears that there is nothing further Edwards could have done to press his claim.

Edwards filed this action on

December 15, 1981. He charges that Asphalt violated the Agreement by dismissing him because of his health or because of protected union activities, giving rise to an action under Section 301 of the Labor Management Relations Act. 29 U.S.C. § 185 (1976). Edwards further charges the Union with breaching its duty of fair representation in grievance proceedings, giving Edwards a cause of action under Vaca v. Sipes, 386 U.S. 171, 87 S. Ct. 903, 17 L. Ed. 842 (1967). There are additional pendent claims based on state law against both defendants.

The Union filed a motion to dismiss Edwards' suit on the grounds that his federal law claims were filed too late. The district court relied on United Parcel Service, Inc. v. Mitchell, 451 U.S. 56, 101 S. Ct. 1559, 67 L. Ed. 2d 732 (1981), in holding that the federal law claims were subject to California's 100-day

limitation period for suits to vacate an arbitration award. Cal. Civ. Proc. Code §1288 (West 1982). These claims were therefore dismissed. The court exercised its discretion to dismiss the state law claims as well, and so dismissed the entire suit.

ISSUES

I. Whether the district court applied the correct California statute of limitations to Edwards' claims against the Union.

II. Whether the Supreme Court's recent decision in Del Costello v. Teamsters, ___ U.S. ___, 103 S. Ct. 2281, 76 L. Ed. 2d 476 (1983), should be applied retroactively.

DISCUSSION

I.

Selection of a California Statute of Limitations

A discharged employee must exhaust the grievance procedures provided by the collective bargaining agreement before seeking direct legal redress. Republic Steel Corp. v. Maddox, 379 U.S. 650, 85 S. Ct. 614, 13 L. Ed. 2d 580 (1965). "[I]f the contractual processes have been seriously flawed by the union's breach of its duty to represent employees honestly and in good faith and without invidious discrimination or arbitrary conduct," the employee has a cause of action against both the union and the employer. Hines v. Anchor Motor Freight, Inc., 424 U.S. 554, 570, 96 S. Ct. 1048, 47 L. Ed. 2d 231, 245 (1976). A discharged employee can sue an employer under section 301 of the Labor Management Relations Act for terminating

him in violation of the collective bargaining agreement. 29 U.S.C. § 185 (1976). A union is subject to suit for breach of the duty of fair representation implied from the National Labor Relations Act. Vaca v. Sipes, 386 U.S. 171, 176-78, 87 S. Ct. 903, 909-10, 17 L. Ed. 2d 842, 849-50 (1967).

Section 301 of the LMRA, which establishes jurisdiction for both kinds of actions, does not provide a statute of limitations. The Supreme Court has established that in general, "the timeliness of a § 301 suit . . . is to be determined, as a matter of federal law, by reference to the appropriate state statute of limitations." UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 704-05, 86 S. Ct. 1107, 1113, 16 L. Ed. 2d 192, 199 (1966).[1/] In United Parcel Service, Inc. v. Mitchell, 451 U.S. 56, 63-64, 101 S. Ct. 1559, 1564-65, 67 L. Ed. 2d 732, 740-41 (1981), the

Supreme Court held that in a section 301 suit brought against an employer, the proper limitations period is the one a state would apply to an action to vacate an arbitration award.[2/] The court below held that Mitchell required it to apply the statute of limitations for an action to vacate an arbitration agreement to Edwards' claims against the Union as well as those against Asphalt.[3/] The search for the appropriate statute of limitations is a decision of law. See Butler v. Local 823, International Brotherhood of Teamsters, 514 F.2d 442, 446 (8th Cir.), cert. denied, 423 U.S. 924, 96 S. Ct. 265, 46 L. Ed. 249 (1975). We review decisions of law de novo. Miller v. United States, 587 F.2d 991, 994 (9th Cir. 1978).

Edwards argues that Mitchell does not require the same statute of limitations in a duty of fair representation claim as in a pure section 301 claim based on a breach

of the collective bargaining agreement. This circuit has recently adopted that proposition. McNaughton v. Dillingham Corp., 707 F.2d 1042 (9th Cir. 1983), states:

> Mitchell did not resolve the question against a union of how an action for unfair representation should be characterized. Justice Stevens, who concurred in part and dissented in part, believed that the claim against the union for unfair representation may not be "characterized as an action to vacate an arbitration award. . . ." 451 U.S. at 73, 101 S. Ct. at 1569, 67 L. Ed. 2d at 746-47. We agree with his analysis.

Id. at 1047-48 (footnote omitted). We must therefore find another state statute of limitations for an employee's suit against his union.

Before the decision in United Parcel Service v. Mitchell, a case in this circuit held that because the duty of fair representation is an obligation fashioned by the courts from the National Labor Relations

Act, a suit against a union for the breach of that duty is best characterized as an "action upon a liability created by statute." Price v. Southern Pacific Transportation Co., 586 F.2d 750, 753 (9th Cir. 1978); accord Kaylor v. Crown Zellerbach, Inc., 643 F.2d 1362, 1369 (9th Cir. 1981). Price therefore applied the three-year statute of limitations of Cal. Civ. Proc. Code § 338(1) (West 1982) to such actions.

We find nothing in United Parcel Service to call Price's analysis into question. Price properly looked to the nature of the claim in choosing an appropriate state statute of limitations. Moreover, the choice of a three-year statute does not violate federal labor policy, for two reasons. First, as discussed above, the possibility of employee suits against a union does not threaten the quick resolution of labor disputes by

means of grievance proceedings. Second, a three-year period is in no sense inherently too long. UAW v. Hoosier Cardinal Corp., 383 U.S. 696, 86 S. Ct. 1107, 16 L. Ed. 2d 192 (1966), the decision that established that "rapid disposition of labor disputes is a goal of federal labor law" for purposes of choosing a state statute of limitations for a section 301 action, itself applied a six-year statute of limitations. 383 U.S. at 707, 86 S. Ct. at 1114, 16 L. Ed. 2d at 200.

Accordingly, we reaffirm Price's holding that the California statute of limitations applicable to a suit against a union for the breach of the duty of fair representation is the three year statute for actions "upon a liability created by statute," provided by Cal. Civ. Proc. Code § 338(1). Edwards filed his suit within thirteen months of his termination and the events that followed. His claims

against the Union were therefore timely, and their dismissal was incorrect.

II.

Impact of the Del Costello Decision

Since this appeal was argued, the Supreme Court has held that the six-month period for bringing an unfair labor practice claim before the NLRB applies both to suits brought against an employer for breach of the collective bargaining agreement and to suits brought against a union for breach of the duty of fair representation. Del Costello v. Teamsters, ___ U.S. ___, 103 S. Ct. 2281, 76 L. Ed. 2d 476 (1983). See National Labor Relations Act § 10(b), 29 U.S.C. §160(b)(1976) (six-month period). We do not, however, apply the rule to this case. Retroactive application of a shorter statute of limitations than that pertaining when the case was filed is inherently unfair. In Chevron Oil Co. v. Huson, 404 U.S. 97, 92 S.Ct.

349, 30 L. Ed 2d 296 (1971), the Supreme Court, in declining retroactive application of a statute of limitations, set forth three factors to consider:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied . . ., or by deciding an issue of first impression whose resolution was not clearly foreshadowed . . . . Second, it has been stressed that "we must . . . weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." . . . Finally, we have weighed the inequity imposed by retroactive application, for "[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the 'injustice or hardship' by a holding of nonretroactivity."

404 U.S. at 106-07, 92 S. Ct. at 355, 30 L. Ed. 2d at 306 (citations omitted) (quoting Linkletter v. Walker, 381 U.S.

618, 629, 85 S. Ct. 1731, 1738, 14 L. Ed. 2d 601, 608 (1965); Cipriano v. City of Houma, 395 U.S. 701, 706, 89 S. Ct. 1897, 1900, 23 L. Ed. 2d 647, 652 (1969)); accord Wiltshire v. Standard Oil Co., 652 F.2d 837, 840 (9th Cir. 1981), cert. denied, 455 U.S. 1034 (1982); Singer v. Flying Tiger Line, 652 F.2d 1349, 1353 (9th Cir. 1981).

The first criterion is met because Del Costello effectively overrules the case relied on above, Price v. Southern Pacific Transportation Co., 586 F.2d 750, 753 (9th Cir. 1978), which clearly applied a three-year statute of limitations to a discharged employee's suit against a union. Although Justice Stewart's concurrence in Mitchell advocated the limitations period adopted in Del Costello, 451 U.S. at 65-71, 101 S. Ct. at 1565-68, 67 L. Ed. at 792-795, (Stewart J. concurring), it appeared to run counter to the majority in Mitchell

and certainly did not "clearly foreshadow" the Costello decision. We find Edwards could reasonably have relied on Price in filing this action. See Wiltshire, 652 F. 2d at 841; Singer, 652 F.2d at 1353. As to the second criterion, we find that the reasons behind allowing actions against a union for the breach of the duty of fair representation would be disserved by barring suit by an employee when precedent existing at the time of filing permitted it. Huson, 404 U.S. at 107-08, 92 S. Ct. at 355, 30 L. Ed. 2d at 306; Wiltshire, 652 F.2d at 841. The third criterion is also satisfied. As the court stated in Huson, "It would . . . produce the most 'substantial inequitable results' . . . . to hold that the respondent 'slept on his rights' at a time when he could not have known the time limitation that the law imposed on him." 404 U.S. at 108, 92 S. Ct. at 356, 30 L. Ed. 2d at 306-07

(quoting Cirpiano v. City of Houma, 395 U.S. 701, 706, 89 S. Ct. 1897, 1900, 23 L. Ed. 2d 647, 652 (1969)); Wiltshire, 652 F.2d at 841-42. This court stated in Singer: "[A] critical factor is that the [new] rule . . . is not one which might have been anticipated." 652 F.2d at 1353. We find that Edwards was similarly unable to anticipate the rule in Del Costello, and accordingly decline to apply that rule retroactively under the three-part test set forth in Huson.

CONCLUSION

The dismissal of Edwards' suit against the Union is reversed. The case is remanded for further proceedings on the claims against the Union.

REVERSED AND REMANDED.

FOOTNOTES

1/ Because all the relevant events occurred in California and all parties are based in that state, California statutes are the proper source for a limitations period. Price v. Southern Pac. Transp. Co., 586 F.2d 750, 753 (9th Cir. 1978).

2/ In United Parcel Service v. Mitchell, the Court declined to consider the possible applicability of National Labor Relations Act section 10(b)'s six-month period, 29 U.S.C. § 160(b) (1976), because it was not raised by the parties. 451 U.S. at 60 n.2, 101 S. Ct. at 1562 n.2, 67 L. Ed. 2d at 738 n.2. The Union does not argue here that § 10(b) should be applied to bar Edwards' action, and we follow Mitchell in declining to consider the question. The Supreme Court has recently

adopted the six-month period for these suits, Del Costello v. Teamsters, ___ U.S. ___, 103 S. Ct. 2281, 76 L. Ed. 2d 476 (1983), but we decline to apply that decision retroactively in Part II infra.

3/ The fact that the Union did bring Edwards' grievance to the Joint Conference Board distinguishes this case from Christianson v. Pioneer Sand Gravel Co., 681 F.2d 577 (9th Cir. 1982). That decision stated that United Parcel Service, Inc. v. Mitchell does not apply where "the Union never even processed appellant's grievances." Id. at 580.

APPENDIX ii

Memorandum Decision
United States District Court
Southern District of California

Lee O. Edwards, Jr.,
Plaintiff,
v.
Teamsters Local Union No. 36,
Building Material & Dump Truck
Drivers, and Asphalt, Inc.,
Defendants.

Civil No. 81-1278-E

Plaintiff was an employee of defendant Asphalt, Inc. and a member of a bargaining unit which is covered by a collective bargaining agreement between Asphalt, Inc. and defendant Teamsters Local 36. Asphalt terminated plaintiff on December 24, 1980. Plaintiff brought his termination to the

union steward as a grievance, as required by the collective bargaining agreement. The agreement provides that the union representative is then required to go to the employer representative and attempt to settle the grievance informally. If the grievance cannot be solved informally it must be referred to the Joint Conference Board for resolution. The bargaining agreement states that the grievance must be presented to the Joint Conference Board within 15 days or it will not be considered. Plaintiff's grievance was brought to the Joint Conference Board on February 9, 1981. The grievance was denied as untimely brought. Plaintiff attempted to get another hearing before the Joint Conference Board on a related matter, but this was also denied as untimely on March 10, 1981. Plaintiff filed this action on December 15, 1981, alleging three causes of action. The first cause is brought under Section 301

of Labor Management Relations Act and charges the local union violated its duty of fair representation in carrying out the above acts. The second and third causes of action are pendent state claims. Defendant Local 36 brought a motion to dismiss or strike, contending: 1) the complaint is barred by the statute of limitations; 2) punitive damages are not available; and 3) attorney's fees are not available. The court, having considered the pleadings and exhibits filed herein, and the arguments advanced at time of hearing, finds the complaint is barred by the applicable statute of limitations and shall therefore dismiss the action. Under such circumstances it is, of course, not necessary to consider the remaining issues.

STATUTE OF LIMITATIONS

The source of jurisdiction for this action is Section 301 of the Labor Management Relations Act, 29 U.S.C. § 185.

Specifically, plaintiff charges that defendant union breached its duty to fairly represent him by failing to process his grievance in a timely fashion. The Supreme Court has long held that the timeliness of a Section 301 suit is to be determined, as a matter of federal law, by reference to the appropriate state statute of limitations. United Parcel Service v. Mitchell, ___ U.S. ___, 101 S. Ct. 1559 (April 20, 1981); UAW v. Hoosier Cardinal Corporation, 383 U.S. 696 (1966). In Mitchell, the Supreme Court stated that suits involving breach of a union's duty of fair representation shall come under the appropriate statute of limitations for actions to vacate an arbitration award, rather than the longer statute of limitations applied to general contract actions.

Soon after Mitchell, the Ninth Circuit made it clear that this rule would be the law of the Ninth Circuit:

> [T]he Supreme Court decided in United Parcel Service v. Mitchell, ___ U.S. ___, 101 S. Ct. 1559, 67 L.Ed.2d 732 (1981), that a suit against a union and employer could best be characterized as a suit to vacate the arbitration award. Many states have short statutes of limitations applicable to such actions, ___ U.S. at ___ n.5, 101 S. Ct. 1564 n.5, and California's 100 day limitations period contained in Cal. Civ. Proc. Code §1288 is no exception.

Singer v. Flying Tiger Line Inc., 652 F.2d 1349, 1353 (9th Cir. 1981).

It cannot be contested that the Joint Conference Board is an arbitration procedure and that its final decision must be considered an award. Rather, plaintiff poses two major objections to the application of Mitchell and Singer to this case: First, he argues that this new rule applying the shorter limitations period should not be applied retroactively to his case. Second, he feels that the rationale for the Mitchell decision was that plaintiff in that case had an

opportunity for full arbitration hearings whereas the failure to bring a timely arbitration claim, such as the union has allegedly done here, is more like a "pure" contract violation.

It is true that there had existed Ninth Circuit authority indicating a longer statute of limitations period would be applied to actions of the kind brought by plaintiff. Moreover, it is true that the Singer court did not apply the new rule to the case it reviewed. However, by the time the Mitchell decision was announced, the parties in Singer had filed their complaint, been through summary judgment in the district court, filed their appeal and were awaiting oral argument in the Ninth Circuit. Up to that point both parties in Singer agreed a different statute of limitations was applicable. Under those circumstances the court stated:

> In the future, as Mitchell requires, when the action is commenced after an unfavorable arbitral decision, we shall treat suits against a union for breach of the duty of fair representation and against an employer for breach of a collective bargaining agreement under this type of limitations statute. In this case, however, we decline to apply the rule.

Singer, supra, at 1353.

It should be noted that Mitchell was decided on April 20, 1981, more than a month before the shorter, 100 day statute of limitations would have run on plaintiff Edwards in this case. Yet his complaint was not filed until December 15, 1981. The Supreme Court, which could have expressly limited its holding to prospective application, chose not to do so. Under all traditional canons of interpretation the rule of Mitchell should be applied to this case.

Plaintiff's second argument is that Mitchell is not applicable to this case because it involved an action where the

plaintiff had a full arbitration proceeding. Plaintiff argues cases where the union fails to even bring about arbitration are more like "pure" contract actions. Though the Supreme Court did mention the prior opportunity for a full hearing in its rationale, the ruling it reached cannot be given the restrictive reading plaintiff suggests. The Court's opinion noted that characterization of the action as a breach of contract ignores the significance of the fact that the action was brought pursuant to Section 301:

> [T]he indispensible predicate for such an action is not a showing under traditional contract law that the discharge was a breach of the collective bargaining agreement, but instead a demonstration that the union breached its duty of fair representation.

Mitchell, supra, at 1562-63.

The narrow reading urged by the plaintiff is not to be found in the Supreme Court's decision. It may also be noted

that the interpretation and rule announced in Singer is not narrow. This court reads the Ninth Circuit to state it will apply the shorter statute of limitations to any such suit commenced after an unfavorable arbitral decision, charging the union with breach of a duty of fair representation. The shorter statute of limitations period found in Cal. Civ. Proc. Code §1288 shall be applied to this case and thus bars the action.

DATED: March 23, 1982.

/s/
WILLIAM B. ENRIGHT, Judge
United States District Court

Copies to:
Plaintiff
Defendants

O R D E R

United States District Court

Southern District of California

Lee O. Edwards, Jr.,

Plaintiff,

v.

Teamsters Local Union No. 36,
Building Material & Dump Truck
Drivers, and Asphalt, Inc.,

Defendants.

Civil No. 81-1278-E

Defendants' motion to dismiss or strike portions of the complaint in the above captioned matter was heard on March 22, 1982. The court, having considered the pleadings and exhibits, as well as the arguments advanced at time of hearing, finds the action is barred by the statute of limitations. Cal. Civ. Proc.

Code §1288. Accordingly,

THIS ACTION IS HEREBY DISMISSED.

IT IS SO ORDERED.

DATED: March 23, 1982.

/s/
WILLIAM B. ENRIGHT, Judge
United States District
Court

Copies to:

Plaintiff

Defendants

APPENDIX iii

Labor Management Relations Act,

29 U.S.C. §185

Suits by and against labor organizations.

Venue, amount, and citizenship

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this chapter and any

employer whose activities affect commerce as defined in this chapter shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

Jurisdiction

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or

acting for employee members.

Service of process

(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

Determination of question of agency

(e) For the purpodes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

APPENDIX iv

California Civil Procedure §1288

A petition to confirm an award shall be served and filed not later than four years after the date of service of a signed copy of the award on the petitioner. A petition to vacate an award or to correct an award shall be served and filed not later than 100 days after the date of the service of a signed copy of the award on the petitioner.

APPENDIX V

Stipulation Re Dismissal Of Case as To Defendant, Asphalt, Inc. and Order Thereon

United States District Court

For the Southern District of California

Lee O. Edwards, Jr.,

Plaintiff,

vs.

Teamsters Local Union No. 36, Building Material and Dump Truck Drivers, and Asphalt Inc.,

Defendants.

No. 81-1278-E(I)

IT IS HEREBY STIPULATED by and between the parties hereto that as to defendant, ASPHALT, INC. the above-captioned action

may be dismissed with prejudice.

SO STIPULATED. Adler and Gniatkowski

Dated: March 4, 1983.

By_____
John S. Adler
Attorney for Plaintiff
Lee O. Edwards, Jr.

SO STIPULATED. McDougal, Meloche, Love & Eckis

Dated: March 2, 1983.

By_____

Attorney(s) for
Defendant Asphalt, Inc.

O R D E R

IT IS SO ORDERED that the above-captioned case be dismissed with prejudice as to defendant, ASPHALT, INC.

Dated: 3/9/83

_____
Hon. WILLIAM B. ENRIGHT,
Judge United States
District Court
Southern District of
California

APPENDIX vi

California Civil Procedure §338

Three years; statutory liability; exception; trespass or injury to realty; taking, detaining or injuring goods or chattels; fraud or mistake; bond of public official; notary public; slander of title; false advertising; water quality and hazardous wastes.

Within three years:

1. An action upon a liability created by statutes, other than a penalty or forfeiture.

APPENDIX vii

June 27, 1983

Office of the Clerk
United States Court of Appeals
for the Ninth Circuit
7th and Mission Streets
P.O. Box 547
San Francisco, California 94104

Re: Edwards v. Teamsters Local 36, etc, et al.
Case No. 82-5326

Dear Sir or Madam:

There is a United States Supreme Court case decided on June 8, 1983 which should be considered in deciding the above-referenced case. In DelCostello v. International Brotherhood of Teamsters, et al, __US__, 113 LRRM 2737 (1983) the Supreme Court expressly overruled UPS v. Mitchell, 451 US 56(1981). A copy of that case is enclosed for your reference. Instead of

resorting to an analogous state statute of limitations, the Court held that the six month period in §10(b) of the NLRB applied in breach of fair representation suits against the union as well as against the employer. Defendant Local 36 respectfully request that the Court consider the DelCostello case in rendering its decision in the present case. It was raised at the trial level that Mr. Edwards' claim was barred by both federal and state statutes of limitation. (CR 2, page 2.)

The Court in DelCostello did not indicate whether its decision was retroactive. However, Singer vs. Flying Tiger Line, Inc., 652 F2d 1349 (9th Cir. 1981) would be helpful in this respect. In Singer this Court held that Mitchell would not be applied retroactively to the plaintiff in the Singer case. The rationale was that since the limitations period under Mitchell was shorter than prior 9th Circuit law, it would be

inequitable to apply the shorter period retroactively, because the plaintiff could have reasonably relied on the longer period

In the present case Defendant Local 36 has argued that Mitchell was decided within a month or two of the dates when the Joint Conference Board rejected Plaintiff Edwards' grievances. Thus, the Singer exception would have no application to Edwards' case. Assuming this Court accepts the argument that Mitchell is controlling, applyiny DelCostello retroactively would not be prevented by the Singer exception, since the period in DelCostello is longer than in Mitchell. Edwards is barred under the DelCostello case. The Joint Conference Board rejected his grievances on February 9, 1981 and March 10, 1981. [Brief for Defendant/Appellee Local 36, p. 16.] Under DelCostello, Edwards should have filed his complaint no later than September 10, 1981. However, he filed it on December 15, 1981. It is thus

clear that his claim is barred either under the Mitchell decision or under the DelCostello decision.

I hope I have been helpful in pointing out the DelCostello case. Defendant Local 36 respectfully requests that it be considered by this Court.

If you have any questions in this regard, please feel free to communicate with the undersigned.

Very truly yours,
/s/
Richard D. Prochazka

RDP/jww

Enclosure

cc: John S. Adler, Esq. w/encl.
Lynn R. McDougal, Esq. w/encl.

APPENDIX viii

Since the publication of the 9th Circuit's decision in Edwards, Union's counsel had become aware of the profound impact of that decision within the Circuit. Fair representation claims in which there are issues of timeliness are as follows:

(1) Cases pending before the Ninth Circuit:

Alderson v. Crescent Truck Lines, 83-2126

Virginia Aragon v. Federated Dept. Stores, Inc., et al, 83-6455

Richard Gonzalez v. Rohr Industries, Inc., et al., 83-6262 (on Interlocutory Appeal)

Robert Johnson v. MCA, Inc., et al., 82-5693

Nelson Rodriquez v. Union Carbide, et al., 83-2709, 83-2553

Washington, et al v. Northland Marine Co., Inc., et al, 83-3850, 83-3851

Williams v. United Airlines, et al, 83-2426

(2) Cases pending before the District Courts within the Ninth Circuit:

Arci, et al v. Machinists, et al.,
82-0340-EFL N.D. Cal.

Bates v. Jamieson Co., et al.,
C-83-1297-WHO N.D. Cal.

Blandino v. Larkins Bros. Tires,
C-82-7080-RPA N.D. Cal.
(motion pending)

William E. Craft, et al. v. Sheet Metal Workers International Association, Local 206, et al.,
82-0734-T(M) S.D. Cal.

DeAllessi v. KSFO,
C-83-4384-SC N.D. Cal.

Ervin Halasz v. Langendorf Bakeries, Inc., et al.,
CV 82-6602-WMB C.D. Cal.

Haupt v. Local Union No. 24, Bakery Workers,
No. Cir. S-83-5632-RHS

John H. Hurtado v. University Mechanical & Engineering Contractors, Inc., et al.,
80-1645-E S.D. Cal.

Lopez v. Mission Lines,
No. Cir. S-83-360 E.D. Cal.

David Mullendore v. The Dannon Company, et al.,
CV 83-0573-MML C.D. Cal.

Theodore Nabraski v. Daily Racing Form, Inc., et al,
83-7552-MML C.D. Cal.

Gerald Pounds v. Mathews Ready Mix, Inc., et al,
S-82-990-EDP E.D. Cal.

Purcell v. Capitol Delivery,
No. Cir. S-81-827-PCW E.D. Cal.

Ben Rameriz v. Cascade National Gas Corp. & Chemical Workers Local 121,
C-83-586-RJM E.D. Wa.

Sardinha v. American Home Foods,
S-80-96-RAR E.D. Cal.

Daniel A. Walden v. A.T.B. Packing Co. & Fresh Fruit & Vegetable Workers, Local P-78-B,
S-81-462-PCW E.D. Cal.

(3) Cases pending before the State Courts within the Ninth Circuit:

Manuela Recorder Carnero v. Intl. Assoc. of Machinists & Aerospace Workers, et al.,
No. 806724 Ca. Superior Court,
S.F. Ca.

Clintsman v. Bergen-Brunswick Corp.,
No. 312131 Cal. Sup. Ct.,
Sac., Ca.

Gregory v. Granny Goose Foods,
No. 526204 Cal. Superior Ct.,
Santa Clara, Ca.

(4) Other:

Ralph R. Hooton, Jr., et al v. Teamsters, Chauffeurs, Warehousemen & Helpers Union Local No. 542, 83-0313-G S.D. Ca.

On November 14, 1983, oral argument was heard on Defendant's Motion to Dismiss Plaintiff's suit as time barred under DelCostello. The Court granted the Motion. Subsequently, however, the District Court learned of the 9th Circuit's decision in Edwards and therefore refused to sign an order until the final disposition of Edwards.

Stephen P. Karo, Jr., et al v. San Diego Symphony Orchestra Association, et al. 83-1161-T S.D. Ca.

Plaintiff Karo's hybrid §301 suit was dismissed on December 21, 1983 due to lack of standing. Plaintiff, however, intends to appeal to the 9th Circuit. Should Plaintiff's appeal be successful, an issue concerning the timeliness of Plaintiff's suit would arise.